INDEX

	Page
THE INTEREST OF THE AMICI CURIAE	2
ARGUMENT	2
CONCLUSION	5

TABLE OF CASES

Horn v. *Cia. de Navegacion Fruco, S.A.*, 404 F.2d 422 (5th Cir. 1968), cert. denied 394 U.S. 943 3

United Air Lines v. *Wiener*, 335 F.2d 379 (9th Cir. 1964), cert. dismissed 379 U.S. 951 4

Ryan Stevedoring Co. v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) 4

Sutes Steamship Company v. *American Smelting & Refining Company*, 339 F.2d 66 (9th Cir. 1964), cert. denied 380 U.S. 964 5

Hidick v. *Orion Shipping & Trading Co.*, 157 F.Supp. 477 (S.D.N.Y. 1957), aff'd. 278 F.2d 114 (2nd Cir. 1960), cert. denied 364 U.S. 830 5

STATUTES

Carriage of Goods by Sea Act, 46 U.S.C. §§ 1301(a)(b), 1303(1), (2) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1439

CENTRAL GULF STEAMSHIP CORPORATION,

Petitioner,

v.

GRACE LINE, INC.,

Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

Retla Steamship Company and Toko Kaiun Kabushiki Kaisha, as friends of the Court, respectfully urge that this Court review the decision of the U.S. Court of Appeals for the Fifth Circuit in this case because of the extremely adverse effect which the decision, if allowed to stand, will have on the just allocation of responsibility for cargo damage as between shipowners and charterers under the form of time charter most commonly used in the carriage of cargo to and from United States ports.

THE INTEREST OF THE AMICI CURIAE

Retla Steamship Company is a California corporation and Toko Kaiun Kabushiki Kaisha is a Japanese corporation. They are unrelated to one another and to the parties to this action. Both are heavily engaged in the carriage of cargo between foreign ports and ports of the United States aboard vessels time chartered under the form of charter involved in this case. Toko is owner of some ships and time charterer of others. Retla is a time charterer. They are filing this amicus curiae brief in their own interest as well as in the interest of other shipowners and charterers who will be affected by the Fifth Circuit decision.

ARGUMENT

Much of the cargo carried to and from the United States by sea is now carried on time chartered vessels. The charter form most commonly used for this purpose is the New York Produce Exchange form time charter, which is the charter form involved in the present case. The "U.S.A. Clause Paramount" provision particularly referred to in the present case is a printed clause of the standard charter form and is contained without modification in most such charters. The impact of the Fifth Circuit decision is therefore general in this branch of the maritime industry.

This form of time charter is a contract by which the owner of the vessel lets the carrying capacity of the vessel to the time charterer for a period of time for the carriage of such cargo between such ports as the time charterer determines. The performance of the functions which must be performed in order to carry and deliver the cargo safely is divided between the shipowner and the time charterer, with the shipowner responsible for the seaworthiness, navigation and management of the vessel and the custody of the cargo during the voyage, and the time charterer responsible for

most aspects [1] of the loading, stowage, discharge and delivery of the cargo. The time charterer ordinarily contracts with third party cargo owners to carry cargo on the vessel under bills of lading issued by either the charterer or the shipowner. Whichever party issues the bills of lading assumes thereby toward the cargo owner all of the obligations of a carrier under the U.S. Carriage of Goods by Sea Act. *46 U.S.C.* § 1301 (a) and (b); 1303 (1) and (2). Therefore, the party issuing the bills assumes obligations to the cargo owner for the proper performance of some work which, under the charter, is performed by the other party. In this situation, the rights of indemnity between shipowner and charterer are the only means by which ultimate responsibility for failure in the performance of a particular function can be brought home to the party which performs that function and which is in the best position to guard against faulty performance. The Fifth Circuit decision in this case places capricious and unwarranted obstacles in the way of the pursuit of these rights of indemnity.

The Fifth Circuit states,[2] as the ground for its decision, that the indemnity rights of the time charterer against the vessel owner are "based on" the rights of the cargo owner against the vessel owner, and that "once the period of limitation ran on [the cargo insurers] suit against [the vessel owner] no indemnification theory could establish [the time charterers] right to receive indemnification from [the vessel owner]." Such a rule places the rights of indemnity between

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[1]The shipowner remains responsible for those aspects of loading, stowage or discharge which affect the seaworthiness of the vessel or the ability of the vessel to perform its obligations as to the care of the cargo. *Horn v. Cia. de Navegacion Fruco, S.A.*, 404 F.2d 422 (5th Cir. 1968), cert. denied 394 U.S. 943. It was the shipowners responsibility for stowage in a manner interfering with the obligation of the ship to properly ventilate the cargo which was the basis of the time charterer's right of indemnity against the shipowner in the case at bar.

[2]In the part of its opinion reprinted at page 20 of the Petition for Certiorari.

charterer and shipowner entirely at the mercy of the whim of the cargo damage claimant. The cargo damage claimant has the right to sue either the shipowner or the time charterer or both at its election. More often than not, the cargo damage claimant sues only the party which issued the bill of lading. If it considers the party which issued the bill of lading to be financially responsible, it ordinarily has no interest in also suing the other party and will ordinarily let the time for suit run against the other party. Therefore, the result of the rule announced by the Fifth Circuit in this case will usually be to prevent responsibility for the cargo damage from being brought home to the party which ought to bear it.

This rule stated by the Fifth Circuit is clearly erroneous. It is based upon confusion between the rules of law applicable to causes of action for indemnity between concurrent tort feasors based on tort principles, such as were involved in *United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir. 1964), cert. dismissed 379 U.S. 951, and the rules applicable to claims for indemnity based upon contract. The Fifth Circuit decision is clearly contrary to the rules governing contractual claims for indemnity as announced by this Court in such cases as *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

There is also an implication in the Fifth Circuit decision that under this form of charter, a suit by the time charterer against the vessel owner, or vice versa, for indemnity with respect to a cargo damage claim must be brought within one year after the cargo damage occurs. As a practical matter, any such rule will either destroy most rights of indemnity or require shipowner and time charterer to file anticipatory law suits against one another in order to preserve those rights. Typically, suits for cargo damage are filed not by the owner or consignee of the cargo, but by insurers of the cargo who have become subrogated to the rights of the consignee or the owners, as in the case at bar. These insurers do not present claims to the ocean carrier until they have adjusted and paid the loss, and this usually does not occur

until just before the one year time for suit is about to run. The suit is often filed against either the owner or the time charterer with only days or hours of the time period left. There is then no time for the party originally sued to assert a claim for indemnity against the other before the one year period from the time of the cargo damage runs. Therefore, the only way in which owner and time charterer can protect their rights of indemnity is to file lawsuits against one another before they have been sued by the cargo claimants in every situation where they fear a claim may result. This would further burden already overcrowded court dockets. Moreover, even such anticipatory suits will not be successful in protecting rights of indemnity if those rights depend upon whether the cargo damage claimant has sued the other party within the one year time for suit, as the Fifth Circuit has said that they must do.

This implication in the Fifth Circuit decision is also contrary to the established principle that the time for suit on a contractual claim for indemnity does not begin to run until the party seeking indemnity has paid a claim or has suffered judgment. *States Steamship Company v. American Smelting & Refining Company*, 339 F.2d 66 (9th Cir. 1964), cert. denied 380 U.S. 964. *Hidick v. Orion Shipping & Trading Co.*, 157 F.Supp. 477, 484-489 (S.D.N.Y. 1957), aff'd. 278 F.2d 114 (2nd Cir. 1960), cert. denied 364 U.S. 830.

CONCLUSION

This Court should grant certiorari in this case for the purpose of clearing away the unreasonable and unwarranted obstacles which the Fifth Circuit decision places in the way of the enforcement of claims for indemnity between ship-

owners and charterers under the form of time charter most commonly used in United States commerce.

Respectfully submitted,

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